

JULY 26, 2002

INTRODUCTION

The underlying case in which the Motion is filed involves a Complaint by Mr. and Mrs. James Tarmann (“Tarmanns”) against Duke, BellSouth, and the Public Service Commission Staff (“Staff”). By their Motion, Duke and BellSouth assert they need entry onto the Tarmanns’ premises in order to properly prepare for the trial of this case. In

support of their Motion, Duke and BellSouth indicate that upon receipt of the Tarmanns' prefiled testimony and exhibits, one of the exhibits is inconsistent with Duke's and BellSouth's understandings of the "location" of electric, telephone, and other utility lines on the Tarmanns' property. Duke and BellSouth assert the need to have all utility lines on the Tarmanns' property located by the Palmetto Utility Protection Service ("PUPS") agency in South Carolina.

Duke and BellSouth also advise the Commission that the "locating" of the utility lines by PUPS will be at no expense to the Tarmanns. Duke and BellSouth also state that each will have representatives on hand to view and chart the "location" of the utility lines on the Tarmann property and that Duke and BellSouth will cause a map to be drawn of all utility lines for use in the trial of the instant case.

Duke and BellSouth also advise the Commission that prior to filing their Motion that they sought a voluntary agreement from the Tarmanns to gain entry to the Tarmanns' property. After voluntary access was initially granted and then denied, Duke and BellSouth filed the instant Motion.

Duke and BellSouth further request a continuance of the hearing on the underlying Complaint until such time as entry onto the Tarmanns' property can be made and the utility lines located by PUPS. Duke and BellSouth offer that such a continuance will be in the best interest of all parties and will aid the Commission in rendering a decision.

The Tarmanns filed an Objection to the Motion. By their Objection, the Tarmanns state that Duke and BellSouth were offered the opportunity to make a site inspection on

the same date that a Commission Staff member visited the property. Further, the Tarmanns assert that BellSouth records should reflect accurate information regarding the location of the lines represented on Tarmanns' Exhibit 7 as a BellSouth employee testified that he made a complete investigation of the claims the Tarmanns made regarding the power supply severed near the home. The Tarmanns assert that Duke and BellSouth were provided ample time to review the prefiled testimony and to request clarification of the exhibit. Further, the Tarmanns state their belief that the Motion is made to cause inconvenience to the Tarmanns and further that the record contains enough information for the Commission to render a just decision without further inconvenience and delay.

APPLICABLE LAW

The Commission recognizes that a Motion for Entry onto Premises is a discovery mechanism utilized by parties in preparation for a trial or proceeding. While the Commission Rules and Regulations do not specifically address a Motion for Entry onto Premises, the Commission's Rules and Regulations provide that "[t]he S.C. Rules of Civil Procedure govern all discovery matters not covered in Commission Regulations 103-850 through 103-852." 26 S.C. Code Regs. 103-854 (Supp. 2001).

Rule 34(a), SCRCP, provides in relevant part that

Any party may serve on any other party a request ... to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

Rule 26(b), SCRCP, is entitled “Scope of Discovery” and provides in subsection (1) that

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

DISCUSSION

Upon consideration of the Motion and the Objection, the Commission finds that the Motion for Entry onto Premises should be granted. The Complaint initiated by the Tarmanns appears to raise the issue regarding the location of certain utility service lines on the property owned by the Tarmanns. As such, the location of electric and telephone lines appears to be relevant to the underlying proceeding. Further, it appears that an exhibit filed by the Tarmanns in their prefiled testimony and exhibits has given rise to questions concerning the actual location of the electric and telephone lines on the property owned by the Tarmanns. Duke and BellSouth are seeking to have the location of the service lines located on the property. That request is within the parameters of Rule 34(a), SCRCP, governing entry upon the land of another and Rule 26(b) governing the scope of discovery. SCRCP 34(a) provides a means by which the location of the lines may be determined by allowing for the entry onto the premises of another for the purposes of inspection, photographing, testing, etc.

Additionally, the Commission finds no evidence to support the assertion of the Tarmanns' that the Motion of Duke and BellSouth was filed to inconvenience the Tarmanns. As noted above, it appears on what is before the Commission that Duke and BellSouth merely want an accurate representation of the location of the service lines on the Tarmanns' property. Further it appears from what is before the Commission that the confusion over the location of the lines was not evident until Duke and BellSouth received the exhibit as filed with the Tarmanns prefiled testimony.

IT IS THEREFORE ORDERED THAT:

1. Duke and BellSouth's Motion for Entry on Premises is granted.
2. Duke and BellSouth shall arrange with the Palmetto Utility Protection Service ("PUPS") to locate all of the utility lines on the Tarmanns' property which pertain to the Complaint action initiated by the Tarmanns.
3. Such entry onto the premises shall be allowed and accomplished within three (3) weeks of receipt of this Order by the Tarmanns.
4. Entry onto the premises shall be allowed for representatives of Duke, BellSouth, PUPS, and the Commission Staff. Representatives of Duke, BellSouth, and the Commission Staff shall be allowed to observe and chart the location of the utility lines, and the representatives of PUPS shall be allowed to locate the utility lines.

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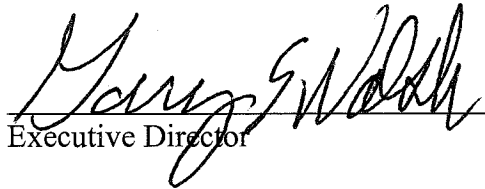
5. The hearing on this matter is continued until such hearing may be rescheduled following completion of the location of the utility lines.

BY ORDER OF THE COMMISSION:



Chairman

ATTEST:



Executive Director

(SEAL)